

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA**

**PAMELA CHAMPION, as Personal
Representative of the ESTATE OF
ROBERT CHAMPION,**

Plaintiff,

Case No.: 2012-CA-002346-O

v.

**A RAY LAND PRODUCTIONS
COMPANY (d/b/a Fabulous Coach
Lines); WENDY MILLETTE; and
FLORIDA AGRICULTURAL AND
MECHANICAL UNIVERSITY
BOARD OF TRUSTEES,**

Defendants.

DEFENDANT FAMU'S MOTION FOR SUMMARY FINAL JUDGMENT

Defendant FLORIDA AGRICULTURAL AND MECHANICAL UNIVERSITY BOARD OF TRUSTEES ("FAMU"), respectfully requests this Honorable Court to render judgment as a matter of law in FAMU's favor for the following reasons:

I. Prelude

"Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." *N. Sec. Co. v. U.S.*, 193 U.S. 197, 400 (1904) (Holmes, J.).

II. Summary of Argument

Mr. Robert Champion, Jr. was a 26-year-old grown adult and stood among the FAMU band's top leaders as one of its Drum Majors. Just a few months before his death, Mr. Champion acknowledged in writing that he fully understood the unlawfulness,

physical brutality and health dangers of participating in hazing, either as a hazer or a hazee. Nevertheless, over the course of several months Mr. Champion discussed and contemplated whether to participate in acts of hazing referred to as “crossing over” during the Fall 2011 Florida Classic weekend in Orlando, Florida.

Ultimately, Mr. Champion decided that he was “sure he wanted to” engage in the hazing in order to garner the respect of some band mates. So after he was relieved of his responsibilities as a band member and had retired to his private hotel room, Mr. Champion changed clothes, left his room, traveled down to the hotel lobby, walked through the hotel lobby and out the door, walked across the hotel parking lot, and then boarded a charter bus to participate and engage in unlawful acts of physical hazing. There is no allegation or evidence that Mr. Champion reported this planned hazing event to law enforcement or university administrators.

When he first got on the charter bus, Mr. Champion observed (or at least heard) a female “crossing over” by being punched, kicked and hit with objects. There is no allegation or evidence that Mr. Champion attempted to stop the female or anyone else from participating in her hazing. Instead, Mr. Champion allowed himself to be subjected to an act of hazing known as a “hot seat,” during which he allowed his adult body to be deprived of oxygen, punched, kicked and hit with objects.

Next, Mr. Champion observed (or at least heard) his friend, Mr. Keon Hollis, being “prepped” with repeated “full force” slaps across his bare chest and back, followed by Mr. Hollis making his way down the center aisle of the bus as he was pummeled with punches, kicks and various objects. There is no allegation or evidence that Mr. Champion attempted to stop his friend or anyone else from participating in his hazing.

Instead, Mr. Champion continued his participation by allowing himself to be “prepped” by standing up, removing his shirt and allowing people to repeatedly “full force” slap his chest and back, and then he proceeded to make his way down the center aisle of the bus while people punched, kicked and pulled back and forth on his adult body. Mr. Champion eventually reached the back wall of the bus, and his hazing episode ended.

Many of Mr. Champion’s co-conspirators are now under criminal prosecution for felony hazing, yet Plaintiff has not asserted any civil claims against any of Mr. Champion’s identified hazers; instead, Plaintiff has brought a “wrongful death” claim against a state entity (FAMU) to recover money damages from the state treasury.

Since Mr. Champion’s lethal injuries arose from his participation in unlawful acts of hazing, Florida’s sovereign immunity and forcible felony-participation-defense statute absolutely bar Plaintiff’s claim against FAMU. Furthermore, the *prima facie* element of “legal duty” is not satisfied here because no public university or college has a legal duty to protect an adult student from the result of their own decision to participate in a dangerous activity while off-campus and after retiring from university-sponsored events.

For these important reasons of state-wide significance, FAMU humbly submits that judgment in its favor is warranted as a matter of law.

III. Background

A. Champion Understood Hazing is Dangerous and Unlawful

1. The State of Florida maintains twelve (12) universities and twenty-eight (28) colleges.¹ The Florida Agricultural and Mechanical University is one such public university and is administered by a “constitutionally created” Board of Trustees.²

¹ Fla. Stat. § 1000.21(3) and (6), (2011). All further statutory cites are to the 2011 versions thereof.

2. Mr. Champion first enrolled at FAMU in 2004,³ and there is no allegation or evidence that he participated in any hazing incidents - either as hazer or hazee - between the his 2004 admission and November 19, 2011.
3. By attending FAMU, Mr. Champion gave his consent to the policies of FAMU, the policies of the Florida Board of Governors, and the laws of the State of Florida, including those policies prohibiting participation in any disruptive activities. Fla. Stat. § 1006.61(1).
4. Pursuant to the Florida Board of Governors Regulation § 1001(4)(a)(8), FAMU Regulation § 2.028, and Fla. Stat. § 1006.63, Mr. Champion was prohibited from engaging in any forms of hazing activities, either as a hazer or a hazee.⁴
5. For the Fall 2011 semester, Mr. Champion was one (1) of six (6) “Drum Majors” in FAMU’s band,⁵ and therefore was “responsible for managing, organizing, and otherwise leading the 375 member FAMU Band.”⁶
6. On August 15, 2011, Mr. Champion executed and provided FAMU with the following written “Hazing and Harassment Agreement”:

The Florida A&M University Marching Band operates under the State of Florida Statutes, Section 1006.63, with strict consequences against all individuals found guilty.

Section 1006.63(1) Hazing Prohibited

As used in this section, “hazing” means any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student for purposes including, but not limited to, initiation or admission into or

² Am. Compl. at ¶ 7; Art. IX, § 7(b) and (c), *Fla. Const.*; and § 1000.21(6)(c), *Fla. Stat.*

³ Ex. “A,” (Mr. Champion’s university transcript). To minimize the volume of this filing, all attached exhibits are authenticated under separate filings to the extent necessary.

⁴ Ex. “B,” (BOG Reg. 1.001); and Ex. “C,” (FAMU Reg. 2.028).

⁵ Am. Compl. at ¶¶ 4 and 14.

⁶ Am. Compl. at ¶¶ 16-17, (emphases added). All further emphases added.

affiliation with any organization operating under the sanction of a postsecondary institution.

Hazing includes, but is not limited to . . . any **brutality** of a physical nature, such as whipping, beating, . . . or other forced physical activity that could adversely affect the physical health or safety of the student . . . Hazing does not include customary athletic events or other similar contest or competitions or any activity or conduct that furthers a legal and legitimate objective.

I, **Robert D. Champion**, have read and fully understand Section 1006.63, Florida Statutes, a copy of which is attached, that prohibits persons from **participating** in hazing and harassment in any manner.

I further realize that my failure to comply with this Statute by **participating as a hazer or hazee** will immediately terminate my membership in the Band.

Furthermore, I understand affiliation or membership with any sub-organization within a section is strictly prohibited by the University Band Staff and will result in my termination from the Band.⁷

B. November 2011 “Florida Classic” Weekend

7. The “Florida Classic” is a football game played annually in Orlando, Florida, by and between FAMU and Bethune Cookman College.⁸
8. FAMU contracted with Defendant FABULOUS COACH LINES (“FCL”) for the transportation of FAMU’s band to and from “events during school-sponsored participation in the three-day Florida Classic weekend, November 19-20, 2011.”⁹
9. “At all times relevant, [FCL] was operating its buses and limousine pursuant to a valid Florida contract between [FCL] and FAMU,”¹⁰ which provides, *inter alia*, that “[d]uring off duty periods the coach shall not be occupied by passengers.”¹¹

⁷ Ex. “D,” (Mr. Champion’s Hazing and Harassment Agreement).

⁸ Am. Compl. at ¶ 22.

⁹ Am. Compl. at ¶ 23.

¹⁰ Am. Compl. at ¶ 11.

10. FCL assigned its employee, Defendant WENDY MILLETTE (“MILLETTE”), to drive Bus “C” during the Florida Classic weekend.¹²

1. Band Members Relieved of Band Responsibilities and Retired to Hotel Rooms

11. After the Florida Classic football game ended on November 19, 2011, the FAMU band “arrived back at the Rosen Plaza Hotel no later than 8:00 p.m.”¹³

12. It is undisputed that the band members “retired to the hotel rooms and common areas respectively, no later than 8:30 p.m.”¹⁴ at which time they “were relieved of their responsibilities as band members.”¹⁵

13. There is no allegation or evidence that Mr. Champion informed law enforcement or university administrators that a hazing event was planned and coordinated for later that evening at a designated place and time in the hotel’s parking lot.

2. Mr. Champion Reflected and Elected to Participate in Hazing

14. Over the course of several months, Mr. Champion and his friend and co-Drum Major, Mr. Keon Hollis, discussed and contemplated whether to participate in acts of hazing referred to as “crossing Bus C.”¹⁶ “Many people in the band were already in Bus C, so those individuals would give [Mr. Champion and Mr. Hollis] the hardest time and disrespect simply because [they] did not cross yet.”¹⁷

¹¹ Ex. “E” at 4 (Charter Terms and Conditions, Driver Restrictions).

¹² Am. Compl. at ¶ 23.

¹³ Am. Compl. at ¶¶ 34-35.

¹⁴ Am. Compl. at ¶¶ 34-35. The word “retire” is commonly understood to mean, “to withdraw from action or danger : retreat[;] to withdraw especially for privacy <retired to her room>[;] to move back : recede [;] to withdraw from one’s position or occupation : conclude one’s working or professional career[;] to go to bed.” <http://www.merriam-webster.com/dictionary/retire> (last visited September 9, 2012).

¹⁵ Am. Compl. at ¶¶ 30-31.

¹⁶ Ex. “F” at 1, ¶ 1 (Sworn Statement of L. Keon Hollis).

¹⁷ Ex. “F” at 1, ¶ 2.

15. “Crossing over” Bus C is a “process by which a student **elects to be accepted** by members of the percussion section by getting onto the bus and trying to traverse from the front of the bus to the rear of the bus. During the ‘cross over,’ members of the bus try to stop the person by holding, hitting and pushing. This process occurs when the bus has stopped and only the students are left remaining on the bus.”¹⁸

16. As described by Plaintiff, “[t]he ‘Bus C’ initiation consists of ‘pledges’ attempting to run from the front door of the bus to the back of the bus, down the center aisle, while initiated members of the Bus C posse position themselves in between seat rows, launching punches, slaps, kicks, hitting with objects, yelling, or assaults and batteries otherwise upon the ‘pledge’ as he or she runs down the aisle of the bus.”¹⁹

17. As set forth in Mr. Hollis’ sworn statement:

When we arrived to the hotel, we immediately went upstairs to our room to change clothes. Robert [Champion] asked me if I were going to cross the bus, and I told him yes. Then [Mr. Champion] stated to me that he was going to cross as well. I asked him if he were sure he wanted to do it and he stated **‘Yea I just want to get it over with.’**

So then I took a shot of Vodka and I and Robert [Champion] went downstairs where we met up with Shawn. All 3 of us walked outside to the bus where it was parked in back of the parking lot. As we arrive people are getting on the bus. Soon as we walk on the bus I notice the bus was running because it was very cold on the bus[.]²⁰

18. According to Plaintiff, “[a]t a **designated** time after 8:30 p.m. and prior to 9:46 p.m., members of the FAMU Band re-boarded one of the [FCL] buses, specifically Bus

¹⁸ Ex. “G” at 2 n. 1, 47 and 89. (Sworn Investigative Report of Orange County Sheriff’s Office). See Fla. Stat. § 90.803(8) (public records and reports are admissible evidence).

¹⁹ Am. Compl. at ¶ 50.

²⁰ Ex. “F” at 1, ¶ 4.

C”;²¹ and Defendant MILLETTE had “exclusive control” over Bus C, had “granted access” to more than twenty (20) people,²² and commenced “standing ‘guard’ at the door of the Bus C.”²³

19. Furthermore, “FAMU Band members or civilians who [had] not been initiated into ‘Bus C’ [were] not allowed onto, nor [were] any present, on the bus at the time of initiation.”²⁴

20. After first boarding Bus C, Mr. Champion complied with the instruction to sit down while a female completed her “crossing over” process down the center aisle of the bus; during this time, Mr. Champion allowed himself to be subjected to an act of hazing known as a “hot seat,” during which he allowed his adult body to be deprived of oxygen, punched and kicked.²⁵

21. Rather than withdrawing from the hazing after completing his “hot seat,” Mr. Champion remained on the bus while Mr. Hollis was “prepped” for his “cross over,” which involved people repeatedly “full force” slapping Mr. Hollis’ bare chest and back.²⁶

22. After being “prepped,” Mr. Hollis began his “cross over” process during which he was repeatedly punched, kicked and whipped by multiple people as he traveled down the

²¹ Am. Compl. at ¶¶ 36, 54, 60 and 61. The word “designated” is commonly understood to mean, “to indicate and set apart for a specific purpose, office or duty[;] to point out the location of[.]” <http://www.merriam-webster.com/dictionary/designated> (last visited September 9, 2012).

²² Am. Compl. at ¶¶ 36, 37, 49, 54 and 61.

²³ Am. Compl. at ¶ 63.

²⁴ Am. Compl. at ¶ 53.

²⁵ Ex. “F” at 1-2, ¶ 5; and Am. Compl. at ¶¶ 54, 55 and 57.

²⁶ Ex. “F” at 2, ¶ 6; and Am. Compl. at ¶ 57.

center aisle of the bus, and he eventually made it to the back wall of the bus and his hazing episode ended.²⁷

23. Before starting his “crossing over” phase of the hazing event, Mr. Champion had allowed himself to be subjected to a “hot seat” and had observed (or at least heard) two (2) other people (Mr. Hollis and noted female) being punched, kicked and hit with objects until they touched the back wall of the bus.²⁸

24. Nevertheless, Mr. Champion continued on with his participation in the hazing by standing up, removing his shirt, and allowing his bare chest and back to be “prepped” with “full force” slaps as Mr. Hollis had previously done.²⁹

25. After allowing himself to be “prepped,” Mr. Champion still continued on with his participation by making his way down the center aisle of the bus whilst being repeatedly punched, kicked, pulled and whipped by multiple people.³⁰

26. According to Plaintiff, “at some point between 9:30 p.m. and 9:46 p.m. [Mr. Champion] appeared at the doorway of the bus and began vomiting in the parking lot,”³¹ to which Defendant MILLETTE allegedly responded by “advis[ing] Mr. Champion “that he would be alright as she forced him back onto the bus.”³² Thereafter, Mr. Champion “was subjected to additional physical punishment. The physical harm suffered by [Mr. Champion] after being forced back onto the bus cumulatively led to the fatal injuries suffered by [Mr. Champion].”³³

²⁷ Ex. “F” at 2, ¶ 6; and Am. Compl. at ¶¶ 50-51, 59-60.

²⁸ Ex. “F” at 2, ¶ 6; and Am. Compl. at ¶¶ 59-60.

²⁹ Ex. “F” at 2, ¶ 6; and Am. Compl. at ¶¶ 50-51 and 56-57.

³⁰ Ex. “F” at 2, ¶ 6; and Am. Compl. at ¶¶ 50-51 and 56-57.

³¹ Am. Compl. at ¶ 62.

³² Am. Compl. at ¶ 65.

³³ Am. Compl. at ¶¶ 66-67.

27. The Orange County Medical Examiner's Office has concluded that "the death of Robert Champion, a 26-year-old male, is the result of hemorrhagic shock due to soft tissue hemorrhage, incurred by blunt force trauma sustained during a hazing incident. Manner of death: Homicide."³⁴
28. The Orange County State Attorney's Office is currently prosecuting twelve (12) of Mr. Champion's accomplices for hazing crimes.³⁵

IV. Standard of Review

A defendant "may move for a summary judgment in that party's favor [on a claim] as to all or any part thereof at any time with or without supporting affidavits." Fla. R. Civ. P. 1.510(b). "The judgment sought shall be rendered forthwith if the [1] pleadings and [2] summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." *Id.*

V. Application

FAMU respectfully submits that judgment as a matter of law is warranted in FAMU's favor for the following reasons:

First, the instant motion accepts as true Plaintiff's allegations that Mr. Champion traveled to and arrived at a "designated" time and place to participate in a coordinated

³⁴ Ex. "H" at 1-2.

³⁵ Pursuant to Fla. Stat. §§ 90.202(6) and 90.203, FAMU respectfully requests the Court to take judicial notice of the pending criminal cases against Mr. Champion's co-conspirators which are listed in the summary attached hereto as Ex. "I."

hazing event, which occurred after he was “relieved of his responsibilities” as a band member and after he had “retired” to his private hotel room.

Second, the sworn statement given by Mr. Hollis to law enforcement is at least the evidentiary equivalent of a notarized affidavit.³⁶ Indeed, unlike one’s simple signing of an affidavit before a notary, Mr. Hollis gave his sworn statement directly to law enforcement, thus vesting it with heightened evidentiary value.³⁷

Third, Plaintiff’s allegations and the summary judgment evidence establish the following material facts:

- Mr. Champion was a 26 year-old grown adult and leader in FAMU’s band;
- Mr. Champion acknowledged in writing that he understood the wrongfulness of participating in hazing, either as a hazer or a hazee;
- Mr. Champion acknowledged in writing that he understood that hazing involves physical brutality such as beatings and could harm his physical health and safety;
- Over the course of months, Mr. Champion discussed and contemplated participating in acts of hazing referred to as “crossing over”;
- In order to garner the respect of some band mates, Mr. Champion decided he was “sure he wanted to” take part in the hazing and told Mr. Hollis, “Yea I just want to get it over with”;
- After making his participation decision, Mr. Champion changed his clothes, left his private hotel room, traveled down to the hotel lobby, walked through

³⁶ See, e.g., *Collins v. Brigman*, 428 So. 2d 373, 374 (Fla. 5th DCA 1983) (trial court may consider “affidavits or any other sworn statement” in ruling on motion summary judgment); *Avampato v. Markus*, 245 So. 2d 676, 678 (Fla. 4th DCA 1971) (noting that a sworn statement “is probably no more nor less reliable than an affidavit written in narrative form, usually by counsel, which is then read and sworn to by the party whose statement it purports to be.”); *S.E.C. v. Am. Commodity Exch., Inc.*, 546 F.2d 1361, 1369 (10th Cir. 1976) (explaining that “statements under oath” are “equivalent to affidavits in terms of the quality of the evidence involved.”); *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 403 (8th Cir. 1995) (“[A] sworn statement taken under oath is at least as reliable as an affidavit for [summary judgment purposes.]”)

³⁷ See Fla. Stat. §§ 843.02 (obstruction of justice); 837.012 (perjury in unofficial proceeding); 837.02 (perjury in official proceeding); 837.021 (perjury by contradictory statements); 837.05 (false reports to law enforcement authorities) and 837.06 (false official statements).

the hotel and out the door, walked across the hotel parking lot, and then boarded bus C;

- After first getting on bus C, Mr. Champion observed (or at least heard) a female “crossing over” by being punched, kicked and hit with objects.
- Mr. Champion allowed himself to be subjected to an act of hazing known as a “hot seat,” during which he allowed his adult body to be punched, kicked and struck with objects.
- Next, Mr. Champion observed (or at least heard) his friend, Mr. Hollis, “crossing over” by being punched, kicked and hit with objects.
- Mr. Champion allowed himself to be “prepped” by standing, removing his shirt, and allowing people to repeatedly “full force” slap his chest and back.
- Mr. Champion made his way down the center aisle of the bus while people punched, kicked and pulled back and forth on his body.
- Mr. Champion eventually touched the back wall of the bus, at which time his hazing episode ended.
- Mr. Champion died from injuries sustained as a result of his participation in hazing.

Fourth, “in Florida, sovereign immunity is the rule, rather than the exception.”

City of Orlando v. W. Orange Country Club, Inc., 9 So. 3d 1268, 1272 (Fla. 5th DCA 2009) (citation and marks omitted). As an exception to the rule, the Florida Legislature has enacted a limited sovereign immunity waiver for tort claims against state university boards of trustees, among others, which limits their liability to \$300,000.00 absent a claims bill approved by the Florida Legislature. Fla. Stat. § 768.28(5).³⁸

In no uncertain terms, however, Florida’s sovereign immunity statute expressly provides that: “No action may be brought against the state . . . by anyone who unlawfully **participates** in a . . . unlawful assembly . . . if the claim arises out of such . . .

³⁸ Specifically, Florida’s limited sovereign immunity waiver applies to the state’s “executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities[.]” Fla. Stat. § 768.28(2).

unlawful assembly[.]” Fla. Stat. § 768.28(15). As a matter of public policy, Section 768.28(15) is “consistent with the equitable notion that the state will not compensate the wrongdoer for the consequences of his wrongs.” *Everton v. Willard*, 468 So. 2d 936, 955 n. 6 (Fla. 1985) (Shaw, J., dissenting). See also *Wong v. City of Miami*, 237 So. 2d 132, 134 (Fla. 1970) (holding that governmental entity could not be held liable for damage caused during a riot, regardless of the fact that the city had removed police officers dispatched to guard against the damage, and noting that “sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence.”).

Fifth, the word “participant” is commonly understood to mean, “one that participates,” the word “participate” means “to take part[,] to have a part or share in something,”³⁹ and the word “participation” means the “act of taking part in something, such as a partnership, crime, or a trial.”⁴⁰ Here, Mr. Champion “participated” in hazing by taking part, having a part, or sharing therein.

Sixth, Florida law provides that an “unlawful assembly” occurs when “three or more persons meet together [1] to commit a breach of the peace, or [2] to do any other unlawful act.” Fla. Stat. § 870.02. Here, it is undisputed that Mr. Champion met together with twenty (20) or more people to take part in a series of unlawful acts of hazing and battery. Hence, Florida’s sovereign immunity entirely bars Plaintiff’s claim if Mr. Champion met with others i) to commit a breach of the peace, or ii) to do any other unlawful act. Fla. Stat. § 768.28(15).

³⁹ <http://www.merriam-webster.com/dictionary/participate> and participant (last visited September 9, 2012).

⁴⁰ Black’s Law Dictionary 1229 (9th ed. 2009).

Seventh, Florida law provides that a “breach of the peace” occurs when a person “[1] commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or [2] engages in brawling or fighting, or [3] engages in such conduct as to constitute a breach of the peace or disorderly conduct.” Fla. Stat. § 877.03. The word “engage” is commonly understood to mean “to interlock with[;] to induce to participate[;] to enter into contest or battle with[.]” ⁴¹

By showing up at the designated time and place and cooperating in and through a series of brutal acts of hazing, Mr. Champion committed an act of such a nature to outrage the public’s sense of decency, and also engaged in an elementary form of “brawling or fighting.” As a result, Florida’s sovereign immunity bars Plaintiff’s alleged claim against FAMU. Fla. Stat. §§ 768.28(15) and 877.03.

Eighth, Florida law also provides that an “unlawful assembly” occurs when “three or more persons meet together . . . to do any other unlawful act.” Fla. Stat. § 870.02. Here, at a minimum Mr. Champion conspired in hazing;⁴² solicited hazing;⁴³ aided and abetted hazing;⁴⁴ and participated in hazing.⁴⁵ Hence, Florida’s sovereign immunity

⁴¹ <http://www.merriam-webster.com/dictionary/engage> (last visited September 9, 2012).

⁴² Fla. Stat. § 777.04(3) (A person commits the crime of “conspiracy” if he or she “agrees, conspires, combines, or confederates with another person or persons to commit any offense.”).

⁴³ Fla. Stat. § 777.04(2) (A “person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense, commits the offense of criminal solicitation[.]”).

⁴⁴ Fla. Stat. § 777.011 (“Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.”). *See also, Gale v. State of Fla.*, 726 So. 2d 328, 329 (Fla. 2d DCA 1999) (“To aid and abet means to help the person who actually committed the crime by doing or saying something that caused, encouraged, incited or assisted the criminal.”).

bars Plaintiff's claim against FAMU because Mr. Champion agreed, conspired, combined or confederated with others to do unlawful acts, and encouraged, requested or helped cause others to commit such unlawful acts. Fla. Stat. §§ 768.28(15) and 870.02.

Ninth, Plaintiff's claim is also statutorily barred by Fla. Stat. § 776.085, which provides that, it "shall be a defense to any action for damages for personal injury or wrongful death . . . that such action arose from injury sustained by a participant during the commission or attempted commission of a forcible felony." Fla. Stat. § 776.085(1). In this context, the term "forcible felony" includes acts such as murder, manslaughter, aggravated assault, aggravated battery, and "any other felony which involves the use or threat of physical force or violence against any individual." Fla. Stat. § 776.08.

Without question, the felony crime of "hazing" generally qualifies as a "forcible felony" because hazing involves "brutality of a physical nature, such as whipping, beating, branding . . . or other forced physical activity that could adversely affect the physical health or safety of the student." Fla. Stat. § 1006.63(1). Moreover, the specific series of hazing acts at issue here qualify as a "forcible felony" given the involved violent acts of oxygen deprivation, punching and kicking.⁴⁶

Notably, § 776.085 broadly bars the claims of any "participant" in a forcible felony. See, e.g., *Gonzalez v. Liberty Mut. Ins. Co.*, 634 So. 2d 178, 179 (Fla. 3d DCA 1994) ("We affirm the summary judgment. We hold that the trial court correctly concluded that section 776.085 bars plaintiff's recovery."). As a result, § 776.085's application is triggered upon the mere showing of "proof of the commission of such

⁴⁵ Fla. Stat. § 1006.63(2) (Hazing is a third degree felony).

⁴⁶ Am. Compl. at ¶¶ 50-52, 54-55, 57, 61-62.

crime or attempted crime by a preponderance of the evidence,” notwithstanding the suing-participant’s lack of commission (or attempted commission) of the subject felony.

So even assuming, *arguendo*, that Mr. Champion did not himself affirmatively commit any crimes in relation to the planning and commission of his hazing episode, Plaintiff’s claim is still barred because Mr. Champion at least “participated as a hazee” in the forcible crime of hazing, and his lethal injuries arose therefrom. To hold otherwise would require the Court to re-write and restrict § 776.085(1) by adding the following emphasized language:

The defense authorized by this section shall be established by evidence that [1] the participant has been convicted of such forcible felony or attempted forcible felony, or [2] by proof of the commission of such crime **by the participant** or attempted crime **by the participant** by a preponderance of the evidence.

The Florida Legislature did not narrowly limit § 776.085(1)’s defense to just bar the claims of people who have been convicted of forcible felonies or attempted forcible felonies, and therefore, any such narrowing argument which might be advanced by Plaintiff should be rejected. See *Fla. Dep’t of Rev. v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001) (“Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the Legislature clearly has not done so.”); *Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999) (“[T]his Court may not rewrite statutes contrary to their plain language.”).

Tenth, the threshold question of whether a “legal duty” exists is a “matter of law that is to be determined by the Court.” *Janis v. Pratt & Whitney Canada, Inc.*, 370 F. Supp. 2d 1226, 1229 (M.D. Fla. 2005) (*citing McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992)). Under Florida law, “a legal duty does not exist merely because

the harm in question was foreseeable. To the contrary, it is clear from *McCain* that the defendant's conduct must 'create' the risk.” *Aguila v. Hilton, Inc.*, 878 So. 2d 392, 396 (Fla. 1st DCA 2004), *rev. denied*, 891 So. 2d 549 (Fla. 2005).

As a matter of law, the inherent risks of “hazing” include “brutality of a physical nature, such as whipping, beating, branding . . . or other forced physical activity that could adversely affect the physical health or safety of the student.” Fla. Stat. § 1006.63(1). Furthermore, it is undisputed that Mr. Champion knew the existence of the danger (hazing) of which Plaintiff now complains, he realized and appreciated the possibility of injuries as a result of such danger, and notwithstanding the opportunity to avoid the danger simply by not showing up at the designated place and time, he deliberately exposed himself to the danger. Further, the series of hazing events occurred i) after Mr. Champion and the other participants in the hazing episode were relieved of their responsibilities as band members and had retired to their private hotel rooms, and ii) on a charter bus and premises that were not under FAMU’s control, but instead were under the “exclusive control” of Defendants FCL and MILLETTE.

As a result, Mr. Champion and the other participants in his hazing episode “created the risk of harm” which caused his unfortunate death, and therefore the *prima facie* element of legal duty cannot be established against FAMU under these circumstances. See, e.g., *Rupp v. Bryant*, 417 So. 2d 658, 668 n.26 (Fla. 1982) (“The school also has no duty to supervise off-premises activities of students which are not school related.”) (*citing Oglesby v. Seminole Cnty. Bd. of Pub. Instruction*, 328 So. 2d 515, 516-517 (Fla. 4th DCA 1976)); *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979) (college has no duty of custodial care of students who, due to maturity, are capable of

protecting self-interests, and because such a duty would impose an unrealistic burden on college), *cert. denied*, 446 U.S. 909 (1980); *Concepcion v. Archdiocese of Miami*, 693 So. 2d 1103, 1105 (Fla. 3d DCA 1997) (holding that high school had no duty to supervise off-campus, non-school related activities during non-school hours); *cf.*, *Gross v. Nova Se. Univ., Inc.*, 758 So. 2d 86 (Fla. 2007) (imposing a legal duty on a private university not to assign students to mandatory internship sites in unreasonably dangerous locations).

Eleventh, Florida law also holds that the question of proximate causation is for the Court to decide where there is an active and intervening cause of the harm, which was “merely ‘possible’ rather than ‘probable.’” See *Roberts v. Shop & Go, Inc.*, 502 So. 2d 915, 917 (Fla. 2d DCA 1986), *rev. denied*, 513 So. 2d 1063 (Fla. 1987) (“We recognize that the ‘foreseeability’ of an intervening causation is frequently a question to be determined by the trier of fact, but it may also be determined as a matter of law in the circumstance where, as here, the intervening act is merely ‘possible’ rather than ‘probable.’”).

In *Roberts*, the plaintiffs sued the defendant convenience store for negligence based on the “monstrous conduct” by one of its customers that occurred just across the street immediately after its customer left the defendant’s premises. The defendant’s customer, Billy Ferry, “entered a Winn Dixie grocery store in Hillsborough County, Florida . . . carrying a pail of gasoline he had purchased minutes before at a Shop & Go convenience store. Once inside the Winn Dixie store, he hurled the gasoline on Winn Dixie customers and employees; he then ignited the gasoline. The blaze killed or severely injured several people.” *Id.* at 916.

In support of their position that the defendant store should have foreseen this heinous attack, the plaintiffs argued that:

The fourth time Ferry entered the Shop & Go, shortly before 8:00 p.m., he purchased \$4.50 worth of unleaded gasoline and filled his pail from an unsupervised self-service gas pump. The clerk next observed Ferry walking across the street towards the Winn-Dixie store with a large cardboard box over his head. She was unable to see his right arm; it was obscured by the box. Immediately thereafter, Ferry deliberately threw and ignited the gasoline inside the Winn-Dixie store.

It is further asserted in the amended complaints that the Shop & Go clerk knew Ferry “was up to something,” that his behavior was odd, he had never bought gasoline from the clerk and the clerk knew he did not own a car.

The Shop & Go clerk also had observed words painted on a nearby wall: “Billy can’t handle it”--“Fire, Fire, Fire”; she knew it was Ferry who had purchased gasoline that night and she also knew that Ferry had a preoccupation with fire. Finally, the Shop & Go store was located in an area with the third highest crime rate in Hillsborough County and such information was available in the public records.

Id. at 916. The circuit court dismissed the plaintiffs’ complaint with prejudice for lack of a legal duty, and the Second DCA affirmed because Ferry’s crime “was an independent intervening cause that was not within the realm of reasonable foreseeability on the part of [Shop & Go].” *Id.* at 917 (internal citations omitted).

In affirming the trial court’s finding of a “total absence of a reasonable expectation that Ferry would commit the crime which occurred [that day],” the Second DCA carefully explained that “foreseeability” is properly determined as a matter of law where the intervening act is merely “possible” rather than “probable,” the difference being that the concept of “natural” and “probable” consequences “are those which a person by prudent human foresight can expect to anticipate as likely to result from an

act, because they happen so frequently from the commission of such act that in the field of human experience they may be expected to happen again.” *Id.* at 917. See also *Michael & Philip, Inc. v. Sierra*, 776 So. 2d 294, 299 (Fla. 4th DCA 2000) (“[I]n applying the ‘foreseeable zone of risk’ test, we are unable to conclude that ‘the *type* of negligent act involved in [this case] has so frequently previously resulted in the same *type* of injury or harm that ‘in the field of human experience’ the same type of result may be expected again.”) (emphases in original and citation omitted); *Reichenbach v. Days Inn of Am., Inc.*, 401 So. 2d 1366, 1368 (Fla. 5th DCA 1981) (Coward, J. concurring) (“That motel guests will be criminally assaulted in the future is not only foreseeable it is a certainty. This will occur not because innkeepers do not protect guests but because crime will continue and citizens generally will continue to be criminally assaulted and motel guests will be no exception. However, the general foreseeability of the risk of a criminal assault upon a guest by a third person only permits such precautionary measures as will deter crime generally.”), *rev. denied*, 412 So. 2d 469 (Fla. 1982).⁴⁷

Here, although Mr. Champion’s participation in the acts of hazing may have been “possible,” it was not “probable” as a matter of law because there is no evidence or allegation that such incidents “happened so frequently” that in the field of human experience he should have been expected to do so in a hotel parking lot hundreds of miles from campus after being relieved of his band member duties and retiring to his

⁴⁷ See also, *Thompson v. Baniqued*, 741 So. 2d 629, 631 (Fla. 1st DCA 1999) (“[T]he fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”); *Trianon Park Condo. Ass’n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985) (“[T]here is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals. In addition, there is no common law duty to prevent the misconduct of third persons.”) (citing Restatement (Second) of Torts § 315).

private hotel room. This conclusion is underscored by the lack of allegation or evidence that Mr. Champion had ever participated in prior hazing events, either as a hazer or a hazee.

Further, Plaintiff's Amended Complaint alleges that, "at some point between 9:30 p.m. and 9:46 p.m. [Mr. Champion] appeared at the doorway of the bus and began vomiting in the parking lot,"⁴⁸ to which Defendant MILLETTE responded by "advis[ing] Mr. Champion "that he would be alright as she forced him back onto the bus."⁴⁹ "[A]fter being forced back onto the bus, [Mr. Champion] was subjected to additional physical punishment. The physical harm suffered by [Mr. Champion] after being forced back onto the bus cumulatively led to the fatal injuries suffered by [Mr. Champion]."⁵⁰

Accepting Plaintiff's allegations as true for purposes of this motion, Defendant MILLETTE's alleged actions constitute an "active and intervening cause" of Mr. Champion's harm as a matter of law, thus precluding any finding that FAMU was the proximate legal cause of Mr. Champion's death. Further, the lack of any allegation or evidence that FAMU knew or should have known that Mr. Champion had participated in any prior hazing events - either as hazer or hazee - render his death especially remote and unforeseeable to FAMU as a matter of law.

VI. Conclusion

In the final analysis, neither Mr. Champion, Mr. Hollis, hotel security, nor law enforcement experts - with all their specialized crime prediction and prevention training and resources - were able to predict or prevent this shocking and depraved hazing

⁴⁸ Am. Compl. at ¶ 62.

⁴⁹ Am. Compl. at ¶ 65.

⁵⁰ Am. Compl. at ¶¶ 66-67.

incident, and therefore, it would be unfair and illogical to hold FAMU to a different and higher level of omnipotence.

Respectfully, as a 26 year old adult and leader in FAMU's band, Mr. Champion should have refused to participate in the planned hazing event and reported it to law enforcement or University administrators. Under these circumstances, Florida's taxpayers should not be held financially liable to Mr. Champion's Estate for the ultimate result of his own imprudent, avoidable and tragic decision and death.

WHEREFORE, FAMU respectfully requests this Honorable Court to render a Final Judgment dismissing with prejudice Plaintiff's Amended Complaint against FAMU, directing that Plaintiff shall take nothing by this action from FAMU, directing that FAMU shall go hence without day on Plaintiff's alleged claim, awarding FAMU its costs of this action, and awarding FAMU all other relief the Court deems just and proper.

Alternatively, pursuant to Fla. Stat. § 768.085(3) and the Court's inherent powers, FAMU respectfully requests the Court to defer ruling on this motion and to temporarily stay this action pending resolution of the criminal cases against the other participants' in the subject hazing episode.⁵¹

Respectfully submitted this 10th day of September, 2012.

/s/ RICHARD E. MITCHELL

RICHARD E. MITCHELL, ESQ.

Florida Bar No.: 0168092

rick.mitchell@gray-robinson.com (Primary)

jacque.denton@gray-robinson.com (Secondary)

GRAYROBINSON, P.A.

301 East Pine Street, Suite 1400

⁵¹ Fla. Stat. § 768.085(3) provides that "[a]ny civil action in which the defense recognized by this section is raised shall be stayed by the court on the motion of the civil defendant during the pendency of any criminal action which forms the basis for the defense, unless the court finds that a conviction in the criminal action would not form a valid defense under this section."

Post Office Box 3068 (32802-3068)
Orlando, Florida 32801
(407) 843-8880 Telephone
(407) 244-5690 Facsimile
Lead Trial Counsel for Defendant,
Florida Agricultural and Mechanical
University Board of Trustees

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2012, I electronically filed the foregoing with the Clerk of the Courts by using the ECF system, and further certify that a true and correct copy of the foregoing has been served via e-mail on all Counsel of Record.

/s/ RICHARD E. MITCHELL
RICHARD E. MITCHELL, ESQ.